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**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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| <b>ILLINOIS COMMERCE COMMISSION</b>          | : |                           |
| <b>On Its Own Motion</b>                     | : |                           |
|  | : |                           |
| <b>Proceeding to monitor the ongoing</b>     | : | <b>Docket No. 03-0056</b> |
| <b>Development of the marketplace for</b>    | : |                           |
| <b>Commonwealth Edison Company customers</b> | : |                           |

**THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO’S  
INITIAL COMMENTS**

***Introduction***

The Building Owners and Managers Association of Chicago (“BOMA”) respectfully respond to the Illinois Commerce Commission’s (“Commission”) request in Docket 03-0056 “...for data and monitoring methodology suggestions from parties on the service list in Docket 02-0479.” This response contains BOMA’s comments and suggestions to the market monitoring methodology effort the Commission has undertaken in this docket.

**1. *Generation Market Concentration***

Proposals by Commission Staff have not addressed the issues associated with market concentration of generation in the ComEd control area. In Docket 02-0479 high market concentrations of generation ownership and control were identified on the Record and by Commissioner Kretschmer in her dissenting opinion.

In that dissenting opinion Commissioner Kretschmer stated:

In assessing whether there is a functioning retail market where substitute service is reasonably available at a comparable price, it is necessary to determine whether the wholesale market is reasonably free of market power, since an effectively competitive retail market is unlikely to exist in the presence of a wholesale market with market power problems. Market concentration is more than a theoretical concept; it is one of the problems that led to extremely high and volatile electric energy problems in California. The record in this case indicates that, given the market concentration levels and base load capacity in the ComEd service territory, services in the ComEd service territory cannot be purchased in a market reasonably free of market power. These conditions do not support the existence of a competitive market. (Kretschmer Dissent at 5)

The Commission echoed this sentiment in their recent report to the General Assembly:

The current wholesale electricity market in Illinois is characterized by highly concentrated generation ownership within utility control areas. ... Even in the

ComEd service area, where ComEd's affiliate has up to this point limited itself to ownership of ComEd's former nuclear plants, concentration among the wholesale players is significant. Exelon Energy, ComEd's affiliate, possesses 32% of the total generating capacity in ComEd's service territory, and all the nuclear capacity, not counting resources controlled through contract. Midwest Generation, a non-affiliate that now owns ComEd's fossil-fueled plants, possesses 34% of the total generation capacity in ComEd's service territory, and all but a fraction of the base and intermediate load fossil fuel-fired generation capacity. In combination, therefore, Exelon and Midwest Generation together own almost all of the baseload and intermediate capacity in ComEd's territory. Furthermore, ComEd has entered into an arrangement with its affiliate to be the sole supplier of power—this puts the ComEd market into an even higher position of concentration if the measure is all generation owned or controlled by Exelon, rather than just the plants owned. (Report at 13)

In its Reply Brief, BOMA noted that ComEd has the ability to control 72.2 percent of the total generation resources in its own control area. (See BOMA Cross Ex. 29.) This is an astounding concentration of resources and raises significant potential for manipulation of market prices. (See ICC Staff Ex. 3.0 at 26; IIEC Ex. 3.0 at 7-8.)

The Commission should include in its focus on the competitiveness of the market an investigation of market concentration that impacts the retail market in the ComEd control area. BOMA respectfully recommends that the Commission take the following approach in measuring the competitiveness of the market in the ComEd control area:

- (1) Staff should quarterly calculate the Herfindahl-Hirschman Index ("HHI") for the total generation portfolio owned by each corporate entity. For example, the HHI for Exelon Corporation would include all assets of each subsidiary of the corporation;
- (2) Staff would quarterly calculate the HHI for the total generation portfolio owned and controlled by each corporate entity. For example, this calculation would not only include the portfolio identified above but also include all assets controlled under contract by each subsidiary of Exelon Corporation;
- (3) A third HHI could be calculated including the portfolio identified in Section 2 above but also including the total import capability of each entity controlled on a corporate basis. This calculation was originally performed by IIEC Witness Chalfant in Docket 02-0479;
- (4) The HHI calculation shall be performed based upon the level of generation controlled and transmission imports controlled based upon each category of asset (i.e., generation – base load, generation – intermediate load, generation – peaking, and, transmission import capability).

BOMA submits that monitoring the development of the market in the ComEd control area should include focusing on market power issues in the manner described above. The market concentration levels should be evaluated in the context of the *Horizontal Merger Guidelines* of the Department of Justice and Federal Trade Commission, which have been adopted by the FERC, and include a set of ranges that have become the standard for evaluating HHIs. Under these *Horizontal Merger Guidelines*, markets with HHIs less than 1,000 are considered

unconcentrated, markets with HHIs between 1,000 and 1,800 are considered “moderately concentrated” and markets with HHIs greater than 1,800 are “highly concentrated.” (See ICC Staff Ex. 3.0 at 26; IIEC Ex. 3.0 at 7-8.)

## **2. *Staff Recommended Customer Statistics***

Staff has recommended a number of statistics be provided to the Commission each month for the balance of the transition period. This information includes:

- (1) The number of customers on RES supply, on Power Purchase Option (“PPO”) service, on Hourly Energy Pricing service, on Interim Supply Service (“ISS”) and on bundled service.
- (2) The number of current delivery service customers that have elected the “irrevocable return” option and the number of current delivery service customers that have elected the “revocable return” option described in ComEd’s 6L rate sheets.
- (3) The number of current delivery service customers that have returned via the “revocable return” option and the number of customers that have returned via the “irrevocable return” provisions described in ComEd’s Rate 6L Rate sheets.
- (4) The number of customers that have exercised their revocable option to remain on Delivery Service Tariff (“DST”) services.
- (5) The number of customers ineligible to return to 6L service.
- (6) The total kWh delivered and the total DST charges, Competitive Transition Charges and – where applicable – charges for electric power and energy (by charge components – demand charges, customer charges, etc.) collected from delivery service customers.
- (7) The kWh delivered and the bundled service charges (by charge component – customer charges, energy charges, demand charges, etc.) collected from Rate 6L bundled service customers.

Commission Staff also recommended that RES’s should provide the following information to Commission:

- (8) The number of customers on direct supply and through PPO assignment.
  - (9) The total kWh delivered and the total charges for electric power and energy collected from delivery service customers through direct supply and through PPO assignment.
- Commission Staff has specified that this information be provided for customer 3 MW and above – those customers which ComEd has requested that the market be declared competitive.

BOMA recommends that this data be required for all customer classes regardless of size and if that class has been declared competitive or not. BOMA’s reasoning is that the customers not included in this class could be viewed as the “control group” in an experiment to judge the behavioral patterns of retail customers. This will also provide the Commission with an

invaluable database of information that can be used in future proceedings if the ComEd petitions the Commission to declare a specific customer class competitive in the future.

### **3. *Functional Separation Issues***

BOMA Chicago can only speculate as to what analyses will be performed with the data specified in the Staff Report. However, BOMA submits that certain analyses cannot be performed with this data, and the data requests to the Company should be expanded. We respectfully suggest that the following data requests also be included to determine whether the integrated distribution company rules remain viable:

- (1) Was any incentive offered to any customer(s) to remain on bundled rates or any other service option offered by Commonwealth Edison Company?
- (2) Did any of these programs fall under the Integrated Distribution Utility program(s). If so specify the following:
  - a. The options customers were offered including non-electric price incentives (e.g., reduced cost capital improvements, software or data options, etc).
  - b. The number of customers that accepted these options.
  - c. Any programs or marketing that provides incentives or rebates for customers to remain on any Company sponsored electric pricing program (e.g., special contracts or billing experiments).
  - d. Information concerning the experimental programs under Section 16-106 of the Act and Rate CS.

### **4. *Market Value Issues***

Also included in the Commission's Report to the General Assembly was a discussion addressing the complications and concerns regarding the determination of electric power market values. The Report stated on page 21:

Since 1999, both the NFF and the market index methods have been used to develop market values. After the NFF was used twice, the Ameren companies, ComEd and IP, with the Commission's authorization, now use a market index approach that relies on measures of wholesale trading activity. Despite efforts by many parties, however, no method has produced entirely satisfactory results. Moreover, there have been seemingly endless arguments over adjustments that parties have contended are needed to reflect "true" market values. One major source of disagreement concerns the extent to which the costs and risks that suppliers incur in serving retail customers, such as marketing costs, congestion risk, credit risk and imbalance risk should be included in the market value calculation. Until such disagreements are resolved with finality, suppliers and

customers will be reluctant to enter into long-term power and energy arrangements.

While the Commission has the authority to rule on adjustments to the market values proposed by various parties in the proceedings through which the market value methodologies are established, Sec. 16-112 of the Act has been construed to mean that a utility that does not wish to accept the Commission's adoption of these adjustments can refuse to implement them. Any utility's refusal to accept the Commission's market value ruling could mean a reversion to the NFF process. Since the NFF process requires every party who traded power in both Illinois wholesale or retail markets to provide the NFF with a contract summary, most participants are quite reluctant to advocate the use of the NFF process. BOMA postulates that this requirement leaves any utility proposing a market value methodology with a bargaining chip against what it might believe are adverse Commission decisions, leaving the Commission in a position of only making the type of rulings that it believes a utility would likely accept.

BOMA suggests that the Commission should also use this opportunity to determine if the mechanisms that are in place for customers (DST tariffs, MVI calculations) actually promote competitive markets. For this reason BOMA suggests the following data be requested:

From each RES, the amount charged to customers  $\geq 3$  MW and the amount these customers implicitly receive through the market value energy charge provided through the MVI. This data is to be provided in an aggregated manner to protect customers and RES confidential market information.

It should be noted that all market participants that execute an appropriate confidentiality agreement be allowed access to the data that will be provided to the Commission in this proceeding.

## **5. *Migration back to Rate 6L***

One of the key issues yet to be determined is whether the market will see a migration of  $> 3$  MW customers back to the bundled tariff for the June 2003 billing period. If such a situation occurs, and a finding is made by the Commission through this monitoring process, BOMA respectfully requests that the previous declaration of competitive for these Rate 6L customers be removed, and Rate 6L be reinstated throughout the remainder of the transition period with the same terms and conditions found in the tariff at the time the Act came into effect.

BOMA also notes that in order to monitor this potential migration, Staff's recommendation that the data required for monitoring be updated on the last business day of April, July, October and January, may not be timely with respect to discerning the migration of customers back to Rate 6L. Therefore, BOMA suggests that the Commission additionally require the monitoring data to be provided coincident with the end of Period A and Period B time periods for sign-up of customers receiving transition charge calculations.

***Conclusion***

BOMA respectfully requests that the Commission include the recommendations suggested above in their market monitoring requirements of Commonwealth Edison Company and Retail Electric Suppliers.

Respectfully submitted,

**THE BUILDING OWNERS AND MANAGERS  
ASSOCIATION OF CHICAGO**

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